The new majority prevailed in the third called session. On October 12, 2003, the legislature enacted legislation creating a new statewide redistricting map, known as Plan 1374C, for Texas congressional seats. Plan 1374C was to immediately replace the *Balderas* Plan 1151C and be used in the upcoming 2004 elections. As the district court explained, Plan 1374C's "single-minded purpose" was "to gain partisan advantage." Travis J.S. App. 89a.

The new redistricting plan used the uncorrected population count from the 2000 census to meet the constitutional requirement of equipopulous districts.[8] Despite the fact that those numbers had issued nearly three years earlier, the state admitted that it "did not make any effort to determine the current populations of the congressional districts." Stip. 85.

The reality was that there had been huge changes in the size and dispersion of Texas population between the spring 2001 release of official census data for redistricting and Plan 1374C's enactment. Undisputed trial evidence established that "rapid and spatially uneven population surges and declines" made the census's 2000 block-level population data "old and specious" both statewide and in local communities. J.A. 170.[9] More than a million people had been added to the Texas population in the interim. *Id.*

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§ 1973c, to the Lieutenant Governor's abolition of the Senate's two-thirds rule. *Barrientos v. Texas*, 541 U.S. 984 (2004), *aff'g*, 290 F.Supp.2d 740 (S.D. Tex. 2003).

[8] The Census Bureau had officially corrected the 2000 census and added thirty people to Texas' total population before Plan 1374C was enacted. *See* Travis County/City of Austin Exh. 2.

[9] This is the testimony of Ryan Robinson, the City of Austin's official demographer. His declaration was admitted without objection as Travis County/City of Austin Exh. 1. The state never offered any contrary evidence, either at the 2003 trial or on remand. Even with the heightened attention the district court devoted to the equal population issue on remand, the state insisted that the evidentiary record had been fully developed. Tr., Jan. 21, 2005, at 123, 140-142.

And the rapidly rising Hispanic share of the population meant that Plan 1374C districts were drawn that "do not fully reflect the current size and spatial scope of the state's largest and most rapidly expanding minority community[.]" J.A. 171. The result of all this growth and its uneven spread was that, in actuality, Plan 1374C's use of 2000 census block data left the "resultant districts . . . not balanced with each other in terms of population." J.A. 172.[10]

Nevertheless, the state used the 2000 numbers – but only for meeting one person, one vote requirements. The chief staffer who drew redistricting maps for the Lieutenant Governor and the Senate testified that he thought it was "silly" in a state as big as Texas to assume that populations had not shifted between the 2000 census and the drawing of Plan 1374C. Tr., Dec. 18, 2003, 1:00 p.m. (Bob Davis), at 221.[11]

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[10] The Robinson testimony is largely qualitative. The Office of the State Demographer for Texas, through the website of the Texas State Data Center, has posted quantitative estimates that bear out Robinson's conclusions. These estimates show that by October 2003, when Plan 1374C was enacted, Texas's population had increased by 1,165,091 since the 2000 census count. The growth was uneven. The county with the largest estimated population loss in the three-year period, Dawson, dropped by 850 people, while the county with the largest gain, Harris, increased by 182,194. Webb County, home to the City of Laredo whose split in Plan 1374C precipitated a heated voting rights dispute about Congressional District 23, had grown by nearly 20,000. Twelve counties, many of them at the center of the legislature's partisan line-drawing disputes, had grown by more than 25,000 people in the three-year period. These estimates are in Table 1 of the "Estimates of the Total Populations of Counties and Places in Texas for July 1, 2002 and January 1, 2003" from the Texas State Data Center's Texas State Population Estimates and Projections Program (Oct. 2003). *See* http://txsdc.utsa.edu/download/pdf/estimates/2002_txpopest_county.pdf (Texas State Data Center website).

[11] This witness for the state also testified: "Well, far be it from me to suggest that the Supreme Court of the United States hasn't given us

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The on-the-ground political decisions about where Plan 1374C's lines would be drawn sprang from a quite different source and time. The political, electoral, and demographic realities of 2003 guided virtually every step of the actual line-drawing. According to the Senate's chief redistricting staffer, the overall objective of the 2003 redistricting effort was to increase the number of Republicans "to more accurately reflect the voting trends in the State" and that "we used election results" to accomplish the partisan ends. Tr., Dec. 18, 2003, 8:30 a.m. (Bob Davis), at 25, 121. The more-than-three-year-old census numbers were brought off the shelf for use only at the margins, to "zero out" the districts for equal population purposes. J.A. 268-270.

The use of post-2000 political realities pervaded the legislative remapping endeavor. Members of the legislature, intimately familiar with post-2000 demographic shifts in their districts, instructed Mr. Davis about precisely where many of the plan's lines should be. Tr., Dec. 18, 2003, 8:30 a.m. (Bob Davis), at 4-5, 9. These legislators were acutely aware of 2002 election results and voting trends; the statistical software on the redistricting computers included a comprehensive statewide compilation of 2002 election results. *See, e.g.*, State Exh. 23; Tr., Dec. 18, 2003, 1:00 p.m. (Rep. King), at 185.

The House side was no different in this regard. Representative King was the House sponsor of the redistricting bill and led its map-drawing effort. Travis J.S. App. 93a, 171a. At trial, he explained about his concerns during the mapping effort over whether the new configuration of Congressional District 4 would fall into the Republican column in the 2004 election. He explained that he had designed it so that the population growth he was seeing

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a proper definition when it says that you use the census numbers for all 10 years of the biennium. And if you're asking is that – does that comport with reality, I will have to let you answer that question." Tr., Dec. 18, 2003, 1:00 p.m. (Bob Davis), at 216.

there would let it "grow into" a Republican district over the decade. Tr., Dec. 18, 2003, 1:00 p.m. (Rep. King), at 176-177 ("Grayson and Collin Counties are fast-growing Republican areas"); Travis J.S. App. 52a. Closer to his home political base in Wise and Parker Counties, Representative King characterized new Congressional District 12 as the product of an effort to take advantage of quite recent trends in population shifts from nearby Denton and Tarrant Counties. J.A. 282-283. He also recalled another member's concerns during the legislative process about an area "becoming so Hispanic" that it might threaten the integrity of Congressional District 30. Tr., Dec. 18, 2003, 1:00 p.m. (Rep. King), at 195-196.

Congressional District 23 is a prime example of the incongruity between, on the one hand, the calculations for meeting the constitutional command of one person, one vote and, on the other, the calculations for satisfying the underlying political objectives that drove the legislative effort in the first place. District 23, stretching along the Texas-Mexico border for hundreds of miles between Laredo in the east and El Paso to the west, while reaching into the San Antonio suburbs further north, had been a Republican district since at least 1992 when its incumbent, Congressman Bonilla, had first been elected. Travis J.S. App. 126a. Under Plan 1374C, District 23 had not performed consistently as a Hispanic opportunity district despite having a bare majority of Hispanic citizen voting age population. Travis J.S. App. 126a. Yet, by 2003, spurred by booming Hispanic population growth, J.A. 285, District 23 "was moving in th[e] direction" of becoming an effective Hispanic opportunity district. Travis J.S. App. 128a. Bending to what population growth was doing to the partisan make-up of the district drawn by the court, and in order to protect Congressman Bonilla, Plan 1374C split off several hundred thousand Hispanic voters from the 2001 version of the district and "prevented it from continuing to move toward becoming an effective opportunity

district." Travis J.S. App. 142a, 166a. In other words, using 2002 election data and contemporary understandings of population trends – but using 2000 population numbers to satisfy constitutional demands – Plan 1374C terminated District 23 as an "evolving Hispanic influence district." Travis J.S. App. 167a n.201.

C. The 2003 pre-remand decision

At the case's inception in 2003, the Travis County appellants, joined by voters from sixteen other Plan 1374C districts, challenged Plan 1374C as violating the constitutional command of one person, one vote. Joint Final Pretrial Order ¶¶ D.10(a), D.1(h); Stip. 7-41.[12] The 2003 decision, however, completely ignores the issue; there is no mention whatever of it. Even as the district court disregarded the equal population issue, and decried a judicial incapacity to tackle excessive partisan gerrymandering of the Plan 1374C sort, it acknowledged that the "most compelling arguments" against mid-cycle redistricting arise from the "impropriety . . . of frequent redistricting" and mused about the desirability of judicial limitations that focus on the "time and circumstance of partisan linedrawing." Travis J.S. App. 84a, 98a.

D. The 2004 post-remand decision

After this Court vacated the 2003 judgment and remanded the case, however, the district court did address the issue, dividing 2-1 over whether a violation had been established.[13] It summarized the equal population

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[12] Voters raising the one person, one vote issue reside in the following Plan 1374C districts: 1, 2, 6, 8, 10, 11, 14, 15, 17, 19, 21, 23, 25, 26, 28, 29, and 30.

[13] Instead of dissenting, Judge Ward, who concluded that Plan 1374C violates the constitutional command of one person, one vote, nonetheless only specially concurred, because of concern that the equal population issue was not within the scope of the remand. Travis J.S.

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challenge: "[D]ilution of the powerful command of one-person, one vote should not be allowed when redistricting is not required by law." Travis J.S. App. 35a.

The district court majority found this equal population argument "a more plausible contention" than the partisan gerrymandering claim, termed it "seductive," and viewed the argument as an invitation to apply "established doctrine in a novel way." Travis J.S. App. 3a, 41a. Ultimately, the majority did not so much reject the one person, one vote argument as exercise discretion not to adopt it. *See, e.g.*, Travis J.S. App. 42a ("we . . . decline to adopt" the rule); *see also id.*, at 3a ("not persuaded that it is appropriate").[14]

The majority gave three reasons for its hesitation. It sensed a tension with the principle that legislatures are free to replace court-ordered plans with their own legislative plans. Travis J.S. App. 37a-38a. It questioned why the argument should be adopted if a legislative plan adopted in 2003 using 2000 census data is no less equipopulous than a court plan ordered in 2001 using 2000 census data. *Id.* 39a. Finally, it pondered whether more frequent redistricting might become the norm or legal expectation if, as the special concurrence suggested, there were avenues for obtaining reliable, current population data for redistricting. *Id.* 40a.

App. 58a. The majority was uncertain on this point. Travis J.S. App. 41a-42a. Any question about whether the scope of the remand extended to the one person, one vote issue is irrelevant to this appeal by the Travis County appellants and the voters who joined with them on this issue from the beginning of the case because they presented the issue to this Court in the first, pre-remand appeal, too. LULAC raised the same challenge on remand.

[14] In a similar vein, at oral argument on remand, one member of the majority, Judge Higginbotham, said that his "reluctance" on the issue "has to do with . . . what should an inferior court do with this argument at this juncture." Tr., Jan. 21, 2005, at 122.

Judge Ward in his special concurrence explains why he would adopt the one person, one vote argument. Travis J.S. App. 47a-56a. He characterizes the proposed constitutional rule somewhat differently than the majority: "The rule ... would require the State to demonstrate that a [voluntary] new redistricting plan does not worsen any population deviations existing among the current districts, denying the benefit of the fiction that the population reflected by the census remains accurate throughout the decade." *Id.* 48a.

Judge Ward expresses concern that, without the rule, and by "incorporating data from election cycles which postdate the most recent census data," states under the control of a single political party may engage in frequent, finetuned gerrymanders "at the expense of the constitutional promise of one-person, one-vote." *Id.* 48a. He discounts the majority's concern that accepting the rule might lead to more frequent redistricting, pointing out that the choice in that regard is political, not legal. *Id.* 49a-50a. He concludes that requiring use of current population figures for voluntary, mid-cycle redistricting to replace a valid plan would be a "structural brake" on partisan gerrymandering. *Id.* 50a. He explains that, while it is the state's burden to make a good faith effort toward equal population, such avenues as special statewide censuses might be available to the state to satisfy that burden if the need to redistrict is sufficiently compelling in a political sense. *Id.* 51a, 53a-55a. Finally, he concludes that the protection afforded legislatures using census data to satisfy the equal population rule should not automatically be extended "to state legislatures which voluntarily embark on the task of redistricting for partisan political purposes." *Id.* 56a.

SUMMARY OF ARGUMENT

Texas's brazen redistricting unmistakably confirms that state legislatures have diminished the venerable one person, one vote principle to little more than a constitutional nuisance. The Court should seize this opportunity to

reinstate the equal population doctrine as a rigorous constitutional principle, providing a judicially manageable standard to check the worst excesses of modern partisan gerrymandering.

The Court's quandary in *Vieth* about whether there is a constitutional firewall that protects the people from overt and excessive partisan gerrymanders arises from the problem of discerning judicially manageable standards to evaluate how much is too much politics in the politically charged world of congressional redistricting. For at least one species of partisan gerrymandering, the constitutional bulwark is readily at hand, with objective standards that channel the judicial inquiry away from determining where along the political continuum state legislatures may have crossed the line of acceptable behavior.

The species of partisan gerrymandering is judicially unforced, voluntary redistricting after the first post-census congressional election cycle directed at increasing one political party's position among the state's congressional delegation. The constitutional principle that provides the judicially manageable standard is the stringent constitutional requirement that congressional districts are to be, as nearly as practicable, equal in population.

The Texas legislature's pioneering pursuit and passage of Plan 1374C in the fall of 2003 was uncoerced by the judiciary and unnecessary under the state's constitution. It was bred of pure partisanship. And, it displayed a remarkable indifference to the constitutional requirement of one person, one vote while simultaneously pulsating with an acute sensitivity and concern for up-to-the-minute politics, election results, and the local implications of demographic shifts. Plan 1374C was fashioned for the representatives, not the people they represent.

Texas's rapid population growth of the 1990s, which yielded two new congressional seats in the 2000 apportionment, continued into the new decade. It was especially pronounced in the surging proportion of the Texas population that is Hispanic. Yet, the same legislature

that insisted on current election data and statistics to support its partisan objective of significantly enhancing the Republican Party's position in the Texas congressional delegation was content to meet its constitutional duty of providing equal representation to the people by using three-year-old census data. It was plain to anyone who cared to notice that this official population data no longer painted an accurate picture of the dispersal of Texas's population. Nonetheless, the legislature used it, admitting that it made no attempt whatever to update it.

Accepting the state's approach in Plan 1374C to meeting its constitutional duty to ensure equal representation of its population in Congress would trivialize one of the grand principles of modern constitutional jurisprudence. It would reduce the one person, one vote rule to little more than a method for correcting rounding errors.

The state's only defense to failing to undertake a good faith effort to equalize actual population is a legal fiction: that official decennial census population data remains valid for the full decade for purposes of the constitutional rule of equipopulous districts. Permitting the state a safe constitutional harbor in this context, though, would be a perversion of the very reason the fiction was created. It was created to relieve states of the obligation to endlessly redistrict as it faced the Sisyphean task of re-balancing district populations to keep up with a mobile society. The state invokes the fiction here for precisely the opposite reason: to free it to redistrict as frequently as partisans wish without having to worry about what has happened to the population balance.

The Court should not extend the protection of the legal fiction of inter-censal population stability to insulate a state wishing to redistrict its congressional seats midway through the census cycle for no reason other than partisan gain. Conforming the fiction to the reasons for its creation would reinvigorate the prime directive of redistricting.

In *Reynolds v. Sims*, the Court established a congruity between the need for periodic redistricting and planned, periodic state adjustments to population dispersal data. In this first detailed exploration of the one person, one vote rule, the Court molded the constitutional command to fit the realities of population dynamics, explaining that the constitutional rule does not require "daily, monthly, annual or biennial" redistricting. Yet, to receive this respite, the state had to have a "reasonably conceived plan" for periodic adjustment of population balances among districts. 377 U.S. at 593.

This is an old-fashioned violation of the strict one person, one vote rule, subordinating the bedrock principle to a brash effort to maximize partisan advantage in the United States House of Representatives. The Court should hold that Plan 1374C violates Article I, Section 2, of the United States Constitution.

ARGUMENT

The Texas legislature's voluntary replacement in 2003 of a legally validated plan with a statewide congressional redistricting plan, relying only on 2000 census data to satisfy the strict equal population rule, is invalid because it is not the product of a good faith effort to create equipopulous districts.

I. Plan 1374C's approach to the constitutional requirement of one person, one vote clashes with the Great Compromise's design of the United States House of Representatives as the legislative body most sensitive to the electorate.

The origins of the one person, one vote constitutional command for congressional districts lie in the Great Compromise by the Framers of our Constitution, which set

the rules for our bicameral system of legislative government. One of the two pillars of this historic agreement about democratic governance – Article I, Section 2, of the Constitution, and its requirement that members of the United States House of Representatives be chosen "by the People of the several States" – is the source of this Court's holding that there must be "equal representation in the House for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964).

By urging constitutional validation of Plan 1374C's indifference to a robust equal population rule, the state is seeking dispensation to separate the political configuration of the House of Representatives from the people who are supposed to elect its members and be represented by them. The state has determined that, while under no legal compulsion, it nonetheless can reconfigure congressional districts midway through decennial census cycles for purely partisan reasons by using up-to-the-minute demographic and political knowledge to achieve political objectives for the elected, but using stale census data to discharge its constitutional duty of equality for the electors.[15] Judicially validating this incongruity principle would further attenuate the link between the people and the members of their House of Representatives and severely erode the foundation of the Great Compromise.

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[15] The state even agrees that its treatment of the exacting one person, one vote rule would authorize the redrawing of congressional lines in the ninth year of the decade, using population data from the beginning of that decade to satisfy the constitutional command of equality nine years later. Tr., Jan. 21, 2005, at 137-138 ("they could do it in the ninth year"). Under the state's theory, the Louisiana legislature would meet the one person, one vote requirement today if it redistricted all the state's congressional districts but ignored (for constitutional but not political purposes) the population displacements caused by Hurricane Katrina and, instead, assumed for Article I, Section 2 purposes that all the people who have permanently shifted their residence were still where they had been when the 2000 census was taken.

The Travis County appellants urge the Court not to let the state of Texas get away with it.

Today for politicians and political parties, yesterday for the people, should not become a redistricting rallying cry for those holding the reins of state legislative power. The jurisprudential era inaugurated by *Baker v. Carr*, 369 U.S. 186 (1962), led to the break-up of encrustations of political power caused by too infrequent redistrictings. In this case, the principles of *Baker v. Carr* and its progeny should be deployed to prevent similar encrustations of political power, this time from too frequent redistrictings.

II. The districts in Plan 1374C are not, "as nearly as practicable," equal in population and do not reflect a "good faith" state effort to achieve population equality.

A. The equal population rule only permits population variations among congressional districts that are unavoidable and the product of a good faith effort to achieve precise equality.

Wesberry laid down the basic rule, one that still guides constitutional evaluation of congressional redistricting plans: "[T]he command of Article I, § 2 . . . means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8. There, the Court was firm that there is no constitutional room for "unnecessarily" abridging the right. 376 U.S. at 17.

The Court further fleshed out the "as nearly as practicable" standard in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). There, the Court explained that the practicability standard rejects the idea of fixed numerical standards, but requires attention to the circumstances of each case. 394 U.S. at 530. For congressional districts, the practicability standard requires the state to make a "good-faith effort" to

achieve precise mathematical equality. *Id.* at 530-531. If there are variances from the constitutional command of equal population among districts, the state must demonstrate either: (a) that it made a good faith effort to avoid the variances but unavoidably ended up with them; or (b) that it has adequate justification for the variances. *Id.* at 531. The burden is the state's. *Id.*

In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court held that challengers to the redistricting bear the burden of establishing that population variations among the districts were avoidable and not the result of a "good faith" effort by the state to achieve equality. The burden then shifts to the state to prove that each variance was "necessary to achieve some legitimate goal" of the state. 462 U.S. at 730-731.[16] The Court determined that New Jersey's congressional redistricting failed the one person, one vote test, not because it did not achieve strict mathematical equality, but because the legislature had made "no serious attempt" to find ways to equalize the districts below the fixed percentage variation – small as it was – that it had used as the termination point for equalization efforts. *Id.* at 731 n.3.

The Court in *Karcher* flatly rejects the proposition that purely political considerations can justify population deviations. *Id.* at 739. The Court does not reject political considerations as an acceptable and integral part of the redistricting process; it simply requires that they cannot

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[16] Between *Kirkpatrick v. Preisler* and *Karcher v. Daggett*, the Court clarified that states have "broader latitude" to meet the constitutional standard of equal population in state legislative redistricting than in congressional redistricting. *See Mahan v. Howell*, 410 U.S. 315, 322 (1973). Thus, the requirement of equal population applicable to Plan 1374C is at its most stringent, with "population alone . . . the sole criterion of constitutionality[.]" *Id.*

be pursued in a way that relegates population equality to the back seat. *Id.*[17]

B. The state did not carry its burden of establishing that the population variances among Plan 1374C's districts, occasioned by the passage of time and the uneven movement of people, are necessary to achieve a legitimate state goal.

The state failed to meet the *Wesberry-Preisler-Karcher* standard in Plan 1374C. If ever there were a redistricting that "unnecessarily" abridges the right of one person, one vote, Plan 1374C is it. In pursuing its political objectives, and in doing so when there was no legal compulsion, the state was utterly indifferent to achieving population equality as nearly as was practicable. Equality was an afterthought. Not only did the state make "no serious attempt" to find ways to equalize the districts based on population; it admits that it made no attempt at all to update the 2000 census numbers that it, along with everyone else, knows were terribly stale by the time the state decided to fire up its redistricting engines.

The Travis County appellants met their initial burden under *Karcher*. True enough, they did not commission a new statewide census that they then could compare with the 2000 census numbers and introduce at trial.[18] But that

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[17] "We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time. Nevertheless, the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases . . . in which the State bears the burden of justifying the differences with particularity." 462 U.S. at 739.

[18] Practically speaking, and money aside, there would have been no time do that in any event. Plan 1374C was passed and signed into law in mid-October, less than two months before the opening of the candidate

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is not required by the burden-shifting rules of *Karcher*. The factually unrebutted Robinson Declaration established that the population shifts across Texas between the time of the 2000 census and Plan 1374C's passage were significant, especially for the burgeoning Hispanic population, and unevenly distributed across the regions of the state. The state's undertaking of the effort at all was transparently avoidable, especially since Plan 1151C was valid for the decade and the legislature had been formally instructed by the Texas Attorney General that there was not any legal need for legislative action. Finally, against this backdrop, the state admitted that it made no effort whatever to achieve equality among the districts, resting instead on what it well knew were census numbers that no longer reflected the distributional reality of the Texas population.

Under *Karcher*, these factual circumstances meant that the burden shifted to the state to prove that the population variances among Plan 1374C's districts was "necessary" to achieve a "legitimate goal" of the state. *Karcher*, 462 U.S. at 731. The state made no real effort to meet its burden in a factual sense. That is, it did not argue that the facts established that relying on the 2000 census in late 2003, even while aware that the census numbers reflected only a past reality, was necessitated by its announced goal of increasing the number of seats for Republicans. Instead, the state's defense to the one person, one vote claim is based on legal arguments. None of them, though, help the state evade the fact that its redistricting did not meet the exacting population equality rule of *Karcher*.

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filing period for congressional seats. The lawsuit was filed immediately upon the bill's passage. J.A. 1. Trial ended before Christmas.

C. The state cannot claim the safe harbor protection of the legal fiction of inter-censal population stasis when it voluntarily separates redistricting from a plan for adjusting population balances to meet the Constitution's equal population requirement.

The state's principal defense against the one person, one vote challenge is the legal fiction that the official census numbers remain accurate and valid throughout the decade. This fiction, argues the state, means that use of the 2000 census population numbers to meet the requirement of equipopulous districts provides the state a safe constitutional harbor from one person, one vote challenges, even if the actual facts are that population equality is not achieved by the mid-cycle redistricting plan. Accepting the state's argument, and applying the legal fiction to validate Plan 1374C's one person, one vote *bona fides*, is unwarranted and would pervert the very reason for the fiction.

The legal fiction of inter-censal population stasis was borne of necessity in the redistricting context. The Court has not been oblivious to real-world events in this regard. It is well aware that "[d]istrict populations are constantly changing, often at different rates in either direction, up or down." *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973). Nonetheless, the Court has concluded that, once a state's post-census redistricting is accomplished to account for population shifts and changes, the state may "operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003).

The reason for the fiction is obvious: to avoid the necessity of constant redistricting to satisfy the equal population rule. In its first delineation of the one person, one vote rule, the Court explained that the constitutional command was not meant to require "daily, monthly,

annual or biennial" redistricting – as long as a state has a "reasonably conceived plan" for periodic readjustment. *Reynolds v. Sims*, 377 U.S. 533, 593 (1964).

The legal fiction is unassailably justified, but only when the reason for its creation matches the circumstance of its application.[19] The problem in using the fiction in this case is two-fold. First, the state invokes the fiction to further a redistricting practice that is the polar opposite of the reason for the fiction. If the state's argument is accepted, and the fiction applied to uphold Plan 1374C, then the fiction is being used to protect redistricting as frequently as a state desires. *Reynolds v. Sims* realized the need for a shield for the states to avoid unending redistricting, and the fiction was created to provide that shield. Neither *Reynolds* nor any of its progeny, though, ever authorized the states to duck behind the fiction so that they could redistrict as frequently as partisans wish in order to stay one step ahead of the voters.

The second problem with protecting the state with the fiction in this case is that Plan 1374C betrays any conception that, as *Reynolds* required, Texas has a "reasonably conceived plan" for periodic adjustment of the population balances in its districts. The state had never before undertaken a statewide redistricting in the absence of new official census numbers or judicial invalidation of a legislatively enacted plan. *Reynolds*, by recognizing that the one

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[19] Particularly pertinent in this context is Justice Frankfurter's observation for the Court that "especially in the disposition of constitutional issues are legal fictions hazardous[.]" *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948). The Court is careful about when to deploy a legal fiction and when not to. For example, in a non-constitutional context, the Court disregarded a legal fiction when it was invoked in a context that would result in "patent injustice." *Safe Deposit & Trust Co. of Baltimore v. Commonwealth of Virginia*, 280 U.S. 83, 92 (1929).

person, one vote rule does not require repeated redistrictings *if* there is a reasonable state plan for periodic adjustment of population balances, links the two pieces of the equal population puzzle. It says in effect that, under the constitutional rule of equal population, the periodic adjustment of population balances is coupled with redistricting. One cannot happen without the other – at least, when it concerns voluntary redistricting undertakings by the state.[20]

Here, though, the state uncoupled the adjustment of population balances from redistricting. It redistricted *without* adjusting the population balances. The Court in *Reynolds*, while perhaps not foreseeing the kind of unprecedented effort leading to Plan 1374C, did forewarn states that they cannot willy-nilly separate population accuracy adjustments from the political imperatives that lead to redistricting and still survive one person, one vote scrutiny.

D. The partisanship that drove Plan 1374C's passage is not a legitimate state goal justifying the undoubted variances of the districts from population equality.

The "single-minded purpose" of furthering partisan objectives and enhancing one political party's standing at

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[20] *Reynolds*, being the first in the line of one person, one vote decisions, was addressing voluntary legislative redistricting action by the states. Only later, as courts came to apply the doctrine and its offspring to invalidate state redistricting actions, did the issue arise of what data should be used for legislative redistrictings in response to judicial invalidation. *Kirkpatrick v. Preisler*, for example, considered a late-decade legislative remap effort that used beginning-of-decade census data to replace an existing legislative plan found to be unconstitutional. In that circumstance, the necessity for action justifies use of the legal fiction that the census figures remain accurate through the decade. In this case, however, Texas is not responding to judicial invalidation of one of its redistricting plans. Plan 1374C was a wholly voluntary undertaking.

the expense of another's was the reason Plan 1374C was pursued and passed. Travis J.S. App. 89a. In *Cox v. Larios*, 542 U.S. 947 (2004), the Court summarily affirmed a district court's holding that achieving partisan aims is not a "good faith basis" for failing to equally balance the population of state legislative districts, even when the departure from equality lies within a commonly acceptable range of difference. *See Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004) (3-judge court) (holding that deviation of 9.98% among legislative districts violates one person, one vote requirement when partisan objectives drove the drawing of lines within the range of variation). On the same reasoning, the Court should hold in this case that the partisan purposes that drove Plan 1374C's passage do not constitute a good faith basis for the plan's undisputed departure from strict population equality among the districts.

1. The opinions in *Vieth* establish that unbridled partisanship is not a legitimate governmental goal in redistricting.

While the Court failed to deliver a majority opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the members of the Court seemed to find common ground in the proposition that pursuit of purely partisan objectives in congressional redistricting is not, by itself, a valid governmental goal. The plurality opinion for four members of the Court expressed no disagreement with the conclusion that partisan gerrymanders are incompatible with democratic principles. 541 U.S. at 292 (J. Scalia, joined by Ch. J. Rehnquist and J. O'Connor and J. Thomas). Four members of the Court, in three dissenting opinions, found constitutional infirmities in a partisan gerrymander. 541 U.S. at 317-342 (J. Stevens, dissenting); at 343-355 (J. Souter, dissenting, joined by J. Ginsburg); and at 355-368 (J. Breyer, dissenting). The remaining member of the

Court concurred in the plurality's judgment and also found disfavor with the partisan gerrymanders as a legitimate end of government if they are directed at disadvantaging one party. 431 U.S. at 316 (J. Kennedy, concurring). Justice Kennedy demurred, however, from the plurality opinion's conclusion that partisan gerrymander claims should be non-justiciable because there are no manageable judicial standards to evaluate them. He declined to bar judicial redress for "all future claims of injury from a partisan gerrymander." 541 U.S. at 309 (J. Kennedy, concurring).[21]

Later, concurring in the Court's first post-*Vieth* disposition of a redistricting case raising partisan gerrymander questions, Justice Stevens, joined by Justice Breyer, highlighted one well-established constitutional ground for addressing claims of injury from partisan gerrymanders. There, they explained that, after the splintered decision in *Vieth*, the equal population rule is the "only clear limitation" remaining for improper redistricting practices and cautioned that "we must be careful not to dilute its strength." *Cox v. Larios*, 542 U.S. at 949-950.

Together, *Vieth*'s several opinions and the *Cox v. Larios* concurrence establish that, regardless of the constitutional validity and justiciability of partisan gerrymander claims *vel non*, pure partisan gerrymanders cannot be treated as legitimate governmental objectives justifying departures from the strict constitutional rule of one person, one vote. Hence, the state cannot justify its failure to make a good faith effort to actually equalize population

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[21] Justice Kennedy cited with approval this remarkably prescient conclusion from the seminal one person, one vote ruling in *Reynolds v. Sims*: "[A] legislature's reliance on other apportionment interests is invalid arbitrary and capricious action if it leads to unequal populations among districts." *Vieth*, 541 U.S. at 310-311, citing *Reynolds*, 377 U.S. at 565-568.

among Plan 1374C's districts by pointing to the abstract legitimacy of state legislative action to redistrict its congressional seats. There was no abstract principle of state legislative authority behind Plan 1374C. The concrete principle the state sought to further was pure partisanship – and that is not a legitimate governmental justification for failing to make a good faith effort to achieve population equality among the districts.

2. Failing to meet the one person, one vote requirement cannot be justified by the claim that Plan 1374C is nothing more than a correction for past partisan gerrymanders.

The state cannot justify its disregard for the one person, one vote requirement by arguing that Plan 1374C is nothing more than a corrective action to overcome past partisan gerrymanders when another party controlled the levers of state government. First, the premise is far from established, resting on little more than anecdotal observations. While the district court majority gave some credence to the argument that the 2003 Republican gerrymander merely supplanted the lingering effects of a 2001 Democratic gerrymander, *see* Travis J.S. App. 21a-24a, 26a-27a, the federal district court that heard the gerrymander claim against the 1991 Texas congressional plan concluded that it was not an illegal gerrymander. *See Terrazas v. Slagle*, 821 F.Supp. 1162, 1172-1175 (W.D. Tex. 1993) (3-judge court), cited in *Vieth v. Jubelirer*, 541 U.S. at 280 n.6.[22]

More fundamentally, though, a desire to tackle and undo actual partisan grievances cannot justify the government's disregard of the one person, one vote rule. "Problems created by partisan politics cannot justify an

[22] *Davis v. Bandemer*, 478 U.S. 109 (1986), guided disposition of the *Terrazas* case.

apportionment which does not otherwise pass constitutional muster." *Kirkpatrick v. Preisler*, 394 U.S. at 533. Furthermore, the Court has held that the constitutional requirement of one person, one vote requires equalization of population, not equalization of political power. *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 697-698, 703 (1989).[23]

So, partisanship, whether as a corrective or as a pure power play, does not absolve the state from complying with the equal population rule and cannot be used to justify the failure to make a good faith effort to provide a current equalization of populations among the districts in Plan 1374C.

III. The concerns of the district court majority do not justify relieving the state from strict compliance with the one person, one vote requirement.

A. The federalism principle that legislative bodies must be given the opportunity to respond to judicial invalidation of redistricting plans is inapplicable in this situation.

The district court was of the view that refusing to indulge the legal fiction of inter-censal population stability to protect the Texas legislature's 2003 redistricting was vaguely at odds with the federalism principle that allows legislatures an opportunity to craft their own solutions to legal faults found in their legislative redistricting efforts. The Court has held that, where there is time, a court invalidating a legislative districting plan should give the state an opportunity to come up with its own solution to

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[23] Similarly, Justice O'Connor observed that "the one person, one vote principle safeguards the individual's right to vote, not the interests of political parties." *Davis v. Bandemer*, 478 U.S. at 149 (J. O'Connor, concurring).

the legal problem. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (plurality opinion).

Those principles do not even remotely apply to this case. This is not a situation in which the state enacted a redistricting plan that was later found by a federal court to have legal flaws. Texas did not enact any plan at all in 2001 in the wake of congressional reapportionment and release of the 2000 census. Even then, the *Balderas* court stayed its hand as long as possible to give the state judicial system a chance to devise a congressional plan. *See* Travis J.S. App. 215a (explaining that the deferral mandated by *Growe v. Emison*, 507 U.S. 25 (1993), had ended without timely state court action). In the end, the *Balderas* court devised Plan 1151C in the wake of total inaction by the state. There was nothing for the state to correct in response to Plan 1151C because the state had done nothing in the first place.

Moreover, the state positively endorsed Plan 1151C. Once the plan was published by the *Balderas* court, the state accepted it. The state not only did not appeal the *Balderas* judgment to this Court, it asked that the judgment be affirmed. In this situation, the federalism principle of equitable deference is inapplicable.

B. Whether population equality in 2003 is greater, less, or the same under Plan 1151C as compared to Plan 1374C is irrelevant to the constitutional requirement that the Texas legislature is obligated to satisfy.

The district court majority first assumed that the population balance among the districts was as much out of kilter in 2003 under Plan 1151C as under Plan 1374C. Then, on that assumption, it questioned whether the one person, one vote rule advocated by the Travis County appellants and others could be applied to the state's plan.

There is no evidence to support the district court majority's assumption. After the Travis County appellants introduced unrefuted evidence that the actual population balance among Plan 1374C's districts was not equal, it became the state's burden to establish some other basis on which its plan could be said to meet the one person, one vote rule. It offered nothing – and it made no effort to demonstrate that Plan 1151C and Plan 1374C were equivalent in their population disequilibrium. The one certain thing on this point is that Plan 1374C *never* met the equal population requirement, whereas Plan 1151C did – and, had the legislature not supplanted it with Plan 1374C, still would through operation of the legal fiction that should be unavailable to the state's plan.

At bottom, the district court majority's concern on this score begs the question of whether the legal fiction should be applied to protect the state's 2003 redistricting from constitutional attack on equal population grounds. The legal fiction developed to protect state legislatures, not federal courts, from the Sisyphean task of continual redistricting in response to the dynamics of continual population shifts. The central question is whether the Texas legislature can claim the legal fiction's protection in the circumstances of this case, not whether the underlying population realities are different for the court-crafted plan than they are for the legislatively-crafted one. Under the argument here, the court-crafted plan remains safe under the fiction's umbrella; the legislative plan never was.

C. Lifting the fiction would not create a perverse constitutional pressure for more frequent redistrictings.

The concurring judge observed that, unlike a rigid prohibition on mid-cycle redistricting, the one person, one vote rule would not create a constitutional straightjacket for state legislatures. He saw them as free to redistrict congressional seats in mid-cycle as long as they could come

up with population data of a sufficiently robust sort. Travis J.S. App. 51a, 53a-55a. In reaction, the majority questioned whether this approach might not open up state legislatures that chose not to redistrict in mid-cycle to claims that they were constitutionally compelled to undertake such redistricting. *Id.* 40a.

This concern is a red-herring. There is a federal statutory requirement of a mid-decade census, but it specifically proscribes the data produced from that particular census from being used to draw congressional districts. 13 U.S.C. §§ 141(d), 141(e)(2). So, there is no threat there of forced mid-cycle redistricting.

Another census provision authorizes the Secretary of Commerce to conduct "special censuses" for states, if the states pay for them. 13 U.S.C. § 196. It does not contain a restriction prohibiting use of the data in congressional redistricting, but it also is clearly permissive, in terms of both the Commerce Department deciding to perform the task and the states deciding to request it. While this may be a vehicle for states that want to voluntarily undertake a mid-cycle congressional redistricting without reliance on earlier population data from the decennial census, it creates no compulsion for the states.

As with the court majority's concern about whether Plan 1151C was just as out of kilter as Plan 1374C in terms of equal district populations, this concern essentially begs the question about the proper operation of the legal fiction at the center of the one person, one vote claim. If the legal fiction insulates otherwise valid congressional redistrictings at the beginning of the decade, before the first round of post-census elections, from later attack for violating the equal population rule as populations inevitably shift, but does not protect voluntary legislative undertakings after that first round of elections, then the majority's concern evaporates.

In the end, notwithstanding concerns of the district court majority, the essential question remains: is the state's voluntary redistricting in 2003 insulated from the

full force of the stringent equal population principle by a legal fiction of inter-censal stability that is designed to avoid the need for frequent redistrictings?

CONCLUSION

The Travis County appellants request the Court to reverse the district court judgment upholding Plan 1374C and order reinstatement of Plan 1151C.[24]

Respectfully submitted,

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January 10, 2006

[24] The district court majority recognized that the "virtually certain result" of acceptance of the one person, one vote argument would be to have upcoming elections conducted under Plan 1151C. Travis J.S. App. 39a.

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Nos. 05-204, 05-254, 05-276, 05-439

IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AM. CITIZENS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

TRAVIS COUNTY, TEXAS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

EDDIE JACKSON, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

GI FORUM OF TEXAS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF OF APPELLEES TINA BENKISER, Chairman, Republican Party of Texas, AND JOHN DeNOYELLES

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PARTIES TO THE PROCEEDING

Appellants in No. 05-276 list Appellee Tina Benkiser and the other parties to the four consolidated cases filed in 2003: *Session v. Perry* (No. 2:03-CV-354) (lead case); *Jackson v. State of Texas* (No. 2:03-CV-356) (consolidated by order of Oct. 23, 2003); *GI Forum of Texas v. State of Texas* (No. 2:03-CV-367) (order of Oct. 27, 2003); and *LULAC v. State of Texas* (No. 2:03-CV-380) (order of Nov. 6, 2003).

The district court also consolidated with *Session v. Perry* three cases filed in 2001, including *Balderas v. State of Texas* (No. 6:01-CV-158) (order of Oct. 23, 2003). Parties to the *Balderas* case include Appellee John DeNoyelles; Emily Amps; John Archer; Rolando Arriola; Associated Republicans of Texas; Atascosa County, Texas; Congressman Joe Barton; Bell County, Texas; Congressman Ken Bentsen; Congressman Kevin Brady; Bonnie Breazeale; Boyce T. Breedlove; David Brown; Tony Campos; Congressman John Culberson; Congressman Tom Delay; Jesse Diaz; Gina Dixon; Pauline Dixon; Bennie Escobar; Denise Escobar; Ed Gonzales; Grayson County, Texas; Vivian Harris; Stephan Leroy Honore; Howard County, Texas; Guy C. Jackson III; Congressman Sam Johnson; Johnson County, Texas; Louis Laster; Ledbetter Neighborhood Association; Dorothy M. Lee; LULAC 4496 of Dallas; Henry Martinez; Ralph McCloud; Mexican-American Legislative Caucus, Texas House of Representatives; Terry Meza; Roy Millner; Michael Moon; Morris Overstreet; Eugene Pack; Dan Pedroza; Raphael Quintanella; George Rios; Margaret P. Rodriguez; Frank D. Sandoval Jr.; Hargie Faye Savoy; Joy Smith; Roy Stanley; Phil Sudan; Texas Farm Bureau Mutual Insurance Company; The Texas Legislative Black Caucus; Alex Vidales Sr.; Dianna Villasana; Charles E. Vinn Sr.; Wichita County, Texas; Molly Woods; Williamson County, Texas; David O. Zambrano; the Attorney General of Texas; the Comptroller of Public Accounts of Texas; and the Texas Land Commissioner.

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SUMMARY OF ARGUMENT

The redistricting plan entered by the three-judge court in 2001 indisputably perpetuated an egregious Democratic gerrymander from the 1990s, thus virtually insuring that the "party with a minority of the popular vote within the State in all likelihood [would retain] a majority of the seats" in the Texas congressional delegation for the second consecutive decade. *Vieth v. Jubelirer*, 541 U.S. 267, 367 (2004) (Breyer, J., dissenting). Although the Pennsylvania Democrats in *Vieth* attacked this situation as a constitutionally impermissible denial of majority rule, *id.* at 271-73 (plurality op.), Texas Democrats now suggest that this situation is constitutionally and statutorily required.[1]

Specifically, they contend that the Texas Legislature's effort to ameliorate this "entrenchment" of a "party that enjoys only minority support" is facially illegitimate because it reflects a purely political desire to "augment the influence" of the majority Republican party by achieving representation roughly commensurate with the level of the party's support in Texas. *Id.* at 360 (Breyer, J., dissenting); Brief of Jackson Appellants ("App. Br.") at 18 n.17. But, while the Constitution does not require redistricting plans to provide roughly proportional representation or majority rule, it most certainly does not prohibit such efforts at political equality, regardless of when this curative effort occurs. Appellants' contention that such ameliorative redistricting is facially impermissible after the first election of the decade makes a mockery of the plain text of the Elections Clause, perverts the limited remedial role of the judiciary in redistricting, and

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[1] Ms. Benkiser, Chairman of the Republican Party of Texas, believes that she should not have been sued as a defendant in this case because the Party was not involved in or responsible for the challenged redistricting, but she has been named as a defendant and appellee in this case and, consequently, files this responsive brief with Mr. DeNoyelles, who had intervened in the district court in 2001 to assert his interests as a voter.

does not rationally serve any norm of equality enshrined in the First or Fourteenth Amendments because it condemns plans that provide "fair and effective representation" under any conception of that term.

Worse still, Appellants contend that the Voting Rights Act's command of equal minority opportunity prevents alteration of one of the worst examples of the brazen 1990s Democratic gerrymander—District 24—solely because the white Democratic representative who drew the district for himself, like virtually all Democrats, enjoys the support of black voters, who comprise 21.4% of the district's voting age population. The notion that Section 2 requires the creation or retention of districts where black voters constitute just over one-fifth of the electorate because they are part of a successful bi-racial coalition which elects a Democrat is irreconcilable with any rational understanding of *minority* vote *dilution*, the language and equal opportunity mandate of the Voting Rights Act, this Court's seminal decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the bedrock principle that the federal judiciary cannot and should not advance the partisan interests of a particular party merely because most minorities belong to it.

I. THE POLITICAL GERRYMANDERING CLAIMS LACK MERIT

A. Appellants' Proposed Test Is Invalid

Appellants do not and cannot contend that the Texas Legislature's plan would have constituted an unconstitutional gerrymander under any standard articulated by any Justice, if it had been enacted in 2001. *See infra* § I.D. Yet they advance the astounding and quite perverse notion that an otherwise perfectly valid redistricting plan becomes invalid simply because the Texas Legislature acted after the first election of the decade. App. Br. at 30. They contend that the timing of the redistricting renders wholly impermissible a legislature's desire to "augment the influence" of one party *relative* to the pre-existing plan, even

if a legislature's plan *improves* "partisan balance," because an effort to cure a "current map [that] is 'unfair' or 'skewed'" is impermissible "state action aimed solely at altering the partisan outcome of elections." *Id.* at 18 n.17, 27-28. To the contrary, if the Equal Protection and First Amendment rights of voters in a political party are not violated by a plan when used for the first election of the decade, then the same plan cannot possibly violate those rights when used in later elections. That is because adherence to these rights can be adjudged based only on what a plan *does*, not *when* it is used.

1. *First*, there is no rational basis for having the constitutional right of voters to "fair and effective representation," *Vieth*, 541 U.S. at 307-09 (Kennedy, J., concurring), turn on whether the Texas Legislature avoided "one-person, one-vote" liability by enacting a plan before the first election in the decade or, instead, performed its constitutionally prescribed responsibility under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, *after* a plan with population equality had been entered. That is why no Justice has ever suggested that a plan's compliance with equal population mandates is even *relevant* in assessing whether it is an unconstitutional gerrymander. Even those Justices who believe that gerrymandering claims should be assessed principally in terms of whether district lines reflect solely a political purpose acknowledge that a plan's adherence to the "one-person, one-vote rule" should *not* be "one of the traditional criteria that may serve to defeat a claim that a district has been gerrymandered on a [political] basis." *Vieth*, 541 U.S. at 339 n.33 (Stevens, J., dissenting). Indeed, a later-enacted "gerrymander" is in place for *less* time, so would, if truly "unfair," be preferable to one that affects all five of the decade's elections.

More fundamentally, preventing a legislature from redistricting unless it has some "*constitutional obligation*" (App. Br. at 26 (emphasis added)) to cure legal *deficiencies* in a court-drawn plan turns the judicial and legislative roles